Petition

81-1296

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JAMES ROBERT BROWN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Petitioner was convicted of violating federal narcotics laws after a jury trial. On appeal, petitioner challenged, inter alia, the validity of his warrantless arrest, the adequacy of voir dire and the propriety of the prosecutor's final argument to the jury. Of the three questions mentioned, two were denied by minute order and the third (the voir dire question) was denied orally at the trial level. On appeal, petitioner requested considered treatment of each of those questions. Each issue was rejected summarily in a memorandum opinion. To date, no federal judge has seen fit to articulate, in any acceptable detail, the basis for rejection of petitioner's arguments. Petitioner questions the adequacy of review at the circuit level.

2. Petitioner challenged the validity of his warrantless arrest by way of a pretrial motion to suppress filed at the district court level. The pretrial challenge was denied by minute order. On appeal, petitioner specifically requested review in light of the distinction between "suspicion" and "probable cause." The panel's memorandum decision reflects summary rejection of the question raised without discussion of the facts or applicable case law. Petitioner questions both the adequacy of review and the result reached in the court of appeals.

3. Petitioner was charged with various narcotics violations involving eleven pounds of amphetamine powder. The trial judge denied supplemental voir dire in the form of a question concerning whether any members of the venire were personally acquainted with or a relative of any person who had been involved with or used narcotic drugs. The panel's memorandum opinion reflects summary rejection of the question raised without discussion of the facts or applicable case law. Petitioner questions both the adequacy of review and the result reached in the court of appeals.

4. Petitioner challenged sustained impropriety on the part of the prosecutor during final argument to the jury. Petitioner's motion for new trial was denied by minute order. On appeal, the petitioner directed the panel to at least seven different forms of forensic misconduct on the part of the prosecutor. Petitioner's argument was rejected summarily on appeal. Petitioner challenges both the adequacy of review and the result reached in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner James Robert Brown respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 10, 1981.

OPINION BELOW

The memorandum opinion of the Court of Appeals appears in the Appendix attached hereto. No written opinions germane to the issues raised here were rendered by the United States District Court for the District of Nevada.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 10, 1981. A timely petition for rehearing and suggestion for rehearing en banc was

denied on November 12, 1981. This petition for certiorari will be filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner and two co-defendants were arrested without a warrant by members of the Drug Enforcement Administration in Sparks, Nevada, on September 14, 1979. The defendants were later tried to a jury and found guilty on all counts. Petitioner now stands convicted of interstate travel in aid of a racketeering enterprise (distribution of amphetamine), distribution of amphetamine, and conspiracy to possess and distribute amphetamine.

Petitioner challenged the validity of his warrantless arrest by way of a pretrial motion to suppress. Following an evidentiary hearing, the motion was denied by minute order. That minute order contained no discussion of the facts or of applicable case law.

The facts and circumstances leading to petitioner's arrest may be summarized in the following fashion. Agents of the Drug Enforcement Administration interviewed Kenneth Anderson, a previously untested confidential informant, at the Clark County Jail in Las Vegas, Nevada, in late August and early September of 1979.

The informant then detailed his involvement in an April, 1979 burglary of a casino warehouse that resulted in the theft of ten slot machines. The informant stated that he had given five of those slot machines to petitioner's co-defendant, Clifford Lee, prior to being arrested for the warehouse burglary. The informant further stated that Clifford Lee had been visiting him in the Clark County Jail (verified by DEA agents) and that Lee had indicated that the five slot machines would be exchanged for narcotics to be obtained from individuals in the State of Oregon.

As a result of the information provided by the informant, Las Vegas DEA conducted a surveillance of various vehicles that could be used in the transportation of the stolen slot machines. On September 14, 1979, Las Vegas DEA agents were advised that one of the vehicles in question, a Cadillac automobile, had been seen driving north toward Reno, Nevada, and that the Cadillac was towing a closed U-Haul trailer. Las Vegas DEA agents notified their Reno office and requested assistance in the form of surveillance. The information forwarded led the Reno officers to believe that they would be involved in a moving surveillance that would take them into the State of Oregon.

Reno agents set up a surveillance and spotted the Cadillac and U-Haul trailer as it was driven into the Reno area. The driver of the vehicle, Clifford Lee, stopped at a local truck stop to gas the vehicle. Lee then drove the Cadillac back onto a main arterial highway in the direction of an exit that would lead to the State of Oregon by the most direct route. The Cadillac, much to the surprise of the DEA agents, did not take the Oregon exit but instead took an exit leading to a major hotel casino in the City of Reno. The Cadillac was parked in the hotel casino's parking lot.

Clifford Lee, whose identity was unknown to Reno agents, left the Cadillac and entered the hotel casino. He proceeded to the bar and met two other adult males (petitioner Brown and his co-defendant O'Brien) who were likewise unknown to investigating agents. The three individuals remained in the bar area for a short period of time and then departed. DEA agents monitored their activities, witnessed no significant activities, and followed the three men back to the truck stop at which Lee had originally gassed the vehicle pulling the U-Haul trailer. Brown and O'Brien arrived at that truck stop in a vehicle bearing Oregon registration. That vehicle was gassed and was thereafter pulled alongside the Cadillac and the U-Haul

trailer. DEA agents scattered around the truck stop parking lot, noted no exchange of any items, save and except the transfer of the U-Haul trailer to the vehicle bearing Oregon registration. That transfer was completed and the Oregon vehicle plus trailer were then moved to another area of the parking lot. The three defendants were arrested at that point for unstated federal narcotics violations.

The arrests resulted in the recovery of a small amount of cocaine from the person of the petitioner. As a consequence of that recovery, agents seized, ostensibly for forfeiture, the vehicle bearing Oregon plates and conducted a search of its interior. Agents at the scene also secured incriminating admissions from petitioner Brown and from his co-defendant Clifford Lee. The items seized subsequent to arrest and the admissions obtained as a consequence of that arrest were detailed in an affidavit submitted in support of three separate search warrants. The warrants authorized search of a briefcase recovered from the vehicle bearing Oregan plates, search of the trunk of the Cadillac driven up from Las Vegas and search of the U-Haul trailer. The search of the briefcase resulted in the seizure of $41,000.00 in cash and a loaded revolver. The search of the trunk of the Cadillac yielded a large green plastic trash bag containing eleven one pound packages of amphetamine powder. The search of the U-Haul trailer yielded five stolen slot machines.

The government conceded at the briefing stage below that validity of the warrantless arrest could have a direct effect on the validity of the issuance of the subsequent search warrants and that suppression of the evidence secured as a consequence of the warrantless arrest possibly would render the remainder of the affidavit insufficient to establish probable cause.

The matter went to trial. Jury selection was conducted in accordance with the "Arizona Plan", the voir dire being conducted by the trial judge. Defense counsel previously had submitted a series of proposed supplemental voir dire questions. The series of questions included the following individual question:

> "Are any of you personally acquainted with or a relative of any person who has been involved with or used narcotic drugs?"

At the beginning of the actual selection process, the trial judge announced on the record that none of the supplemental questions tendered would be asked. Upon completion of voir dire, the trial judge asked defense counsel to approach side bar and inquired as to whether counsel sought any additional inquiry. Counsel for petitioner Brown again proffered a request relating to the general subject matter of question 46. The request was again denied.

The matter was tried. During the course of argument, counsel for the government cast aspersions on the integrity of defense counsel by noting that attorneys do not take an oath and that defense attorneys, much like expert witnesses, do what they get paid to do. The prosecutor referred to legitimately advanced objections as obstruction on the part of defense counsel.

The prosecutor made comments on the personal appearance of the defendants collectively and made the following comment:

> "They're just what they appear to be. That's what they look like, mean, calculating, shrewd, greedy."

The prosecutor went on to suggest, without the benefit of any supporting evidence, that petitioner Brown and his co-defendant Lee were "seasoned and experienced" in dealing with custodial interrogation.

The prosecutor inferred that the jury should reward the government agents for their efforts by returning a verdict of guilty. In keeping with that suggestion, the prosecutor made the following statement:

> ". . . (T)here will be a great attack made on their integrity and their ability, the Drug Enforcement Administration agents. They did a good job. The Government did a good job. You tell them that when they come in and attack them, when they attack the job that these men did."

The prosecutor twice vouched for the credibility of the government's principal witness, the confidential informant previously identified in this document.

Finally, the prosecutor changed theories in his rebuttal argument, thus denying the defense an opportunity to respond to the alternative theory presented to the jury at the close of the case.

Following deliberation, the jury returned with verdicts of guilty. Judgment was entered on each of the three five year counts involved. Petitioner Brown was sentenced to consecutive terms of five years, five years and four years on those three counts.

REASONS FOR GRANTING THE WRIT

I

THE MEMORANDUM OPINION RENDERED BELOW DOES NOT REFLECT STUDIED REVIEW OF THE QUESTIONS RAISED

The Court will find attached to this petition a copy of the memorandum decision issued by the Ninth Circuit Panel in this case. The substantive questions presented to that court and now presented to this Court include examination of a Fourth Amendment issue involving a detailed set of facts, a voir dire question challenging the lower court's failure to deal adequately with a salient factor of

the case and a challenge to repeated and incessant impropriety on the part of the prosecutor in presenting argument to the jury.

As noted earlier, the Fourth Amendment challenge was denied by minute order at the district court level. On appeal, counsel sought studied consideration of the facts leading to the arrest of the petitioner. Both counsel for the petitioner and counsel for the government agreed that a Ninth Circuit opinion, *United States v. Bernard*, 607 F.2d 1257 (9th Cir. 1979), was virtually dispositive of the question raised. Counsel sought particularized review and received instead a blanket statement to the effect that the court's independent review of the record supported the lower court's determination of the existence of probable cause. There was no discussion of the facts. There was no discussion of or citation of applicable case law.

Petitioner Brown's challenge to the adequacy of the voir dire pointed to the trial court's failure to deal with a salient factor in the course of the jury selection process. The panel had been referred to a decision from the Second Circuit, *United States v. Barnes*, 604 F.2d 121 (2nd Cir. 1979), Cert. denied, 446 U.S. 907, which indicated that a question of that nature was deemed "usual" in the context of a narcotics distribution case. Without benefit of any discussion of applicable case law, the panel summarily rejected petitioner Brown's claim, noting that the claim for relief had no support whatsoever in the record.

The panel made the same blanket statement on the question of prosecutorial misconduct. In the statement of the case filed with this Court, counsel has noted examples of at least seven different forms of forensic misconduct present on the record in this case. The defense conceded the absence of objection in all but one of the instances identified and urged a "plain error" analysis. There was no

discussion of the doctrine of "plain error" and its application to the facts of this case. The panel instead issued a terse response to the effect that the argument was unpersuasive and found no support whatsoever in the record. The record belies that ostensibly cursory and terse resolution of the question raised below.

Counsel is mindful of the fact that this Court does not sit as a "court of review" for all decisions rendered in the federal circuit. Counsel is mindful of the fact that full consideration by the court is reserved for singular cases which present compelling issues that merit the extraordinary consideration of briefing and oral argument. The question raised here goes beyond the substantive questions raised. The question goes to the quality of review. The Chief Justice of this Court, in his annual year-end report on the state of the national judiciary, made comments relating to the increase in filings throughout the judicial system. The Chief Justice warned that these increases in case load presage a time when the courts would produce assembly line decisions. The use of the term presage perhaps involves understatement. The memorandum opinion rendered in this case is a prototype for the assembly line decision predicted by the Chief Justice of this Court.

As noted above, counsel is mindful of the fact that this Court does not sit in review of each and every decision made in the federal circuits. The Circuit Courts, by contrast, do sit as courts of review. The questions presented below were serious questions. Those questions were given short shrift. Accordingly, petitioner seeks a limited form of relief in the form of a grant of certiorari and summary remand to the United States Court of Appeals for the Ninth Circuit for reconsideration and articulation of the basis for denial of the substantive issues identified in this petition.

II

THE LOWER COURT'S FAILURE TO DISTINGUISH BETWEEN REASONABLE SUSPICION AND PROBABLE CAUSE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND, IN EFFECT, COUNTENANCES A SEIZURE OF THE PERSON BASED ON A HUNCH ENTERTAINED BY FEDERAL LAW ENFORCEMENT AGENTS. FULL REVIEW WILL ALLOW THIS COURT THE OPPORTUNITY TO APPLY THE RECENTLY ANNOUNCED "TRAINED POLICE OFFICER" ANALYSIS OF U.S. v. CORTEZ TO A WARRANTLESS ARREST

This Court has long held that the decision to arrest must stand upon something more than bare suspicion. See *Brinegar v. United States*, 338 U.S. 160 (1949); *Wong Sun v. United States*, 371 U.S. 471 (1963). See also *Henry v. United States*, 361 U.S. 98, 101 (1959), noting the existence of early decisions indicating that "strong reason to suspect" is not adequate to support a warrant for arrest.

More recent articulation of the distinction between "reasonable suspicion" and "probable cause" began in *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* and its progeny indicate that a police officer may engage in conduct less intrusive than a formal arrest where that officer has specific and articulable facts which support a reasonable inference that criminal activity may be afoot. See *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 2574 (1975); *United States v. Cortez*, ... U.S. ....., 101 S.Ct. 690 (1981).

None of those decisions, however, signalled dilution of the probable cause standard. To the contrary, those decisions reinforce the proposition that probable cause transcends reasonable suspicion. The reason for the distinction is clear. As noted in *Terry*,

> " . . .(a)n arrest is a wholly different kind of intrusion upon individual freedom. . . . (A)n arrest is the

> initial stage of criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

Before an intrusion of that nature is allowed, the arresting officer or officers must be able to point to facts sufficient to warrant a prudent person, or one of reasonable caution, in believing that an offense has been committed. See *Michigan v. DiFillippo*, 443 U.S. 31 (1979).

Throughout the course of this litigation, petitioner has conceded that the arresting agents had the right to rely on the collective information available to both the Reno and Las Vegas agents involved in this particular investigation. See *United States v. Bernard*, 607 F.2d 1257 (9th Cir. 1979). Cf. *Whiteley v. Warden*, 401 U.S. 560 (1971). Counsel is mindful of the fact that observations made by police officers are to be judged in light of the training and experience of the person making those observations. Cf. *United States v. Cortez*, ... U.S. ....., 101 S.Ct. 690 (1981). It should be noted, however, that the collective knowledge of trained police officers must still go beyond hunch playing and the artful guesswork often displayed by federal drug agents. In *United States v. Chadwick*, 532 F.2d 773 (1st Cir. 1976), aff'd on other grounds, 433 U.S. 1 (1977), the author of the circuit opinion made the following pertinent observation:

> "An agent, to be sure, is an expert of sorts, and from certain facts he may be able to derive meaning that would elude an untrained or inexperienced person. But it is one thing to credit an agent's skilled interpretation of adequate facts, and another to credit the agent's suspicions simply because the agent is an agent. Good hunches are the foundation of good police work, but they are not probable cause."

The distinction made by the author of the circuit decision in *Chadwick* represents the crux of the Fourth Amendment problem that is present in this case.

Here, the arresting agents in Reno had been advised that they were to expect an identified automobile pulling a U-Haul trailer and that they were to institute surveillance. It was anticipated that the vehicle in question would be driven to the State of Oregon and that the contents of the trailer would be exchanged for narcotics. Those expectations were not realized. The officers present adapted themselves to the change in circumstances and instituted a surveillance that yielded nothing more than a transfer of the closed U-Haul trailer from one vehicle to another. Despite the presence of several agents placed strategically throughout the parking lot in which the trailer was transferred, no single agent could testify to having observed a transfer of any items other than the trailer itself. In short, no person, trained agent or otherwise, could reasonably infer that a transfer of narcotics or other violation of federal narcotics laws had taken place in their presence. The agents could and did play a hunch. The record reveals no more.

There is no question that this Court and other circuit courts properly credit the experience and training of seasoned police officers in making warrantless stops and arrests. *United States v. Cortez,* supra; *United States v. Davis,* 458 F.2d 819 (D.C. Cir. 1972). The language and analysis employed at the circuit level in *Chadwick,* however, is compelling. It is indeed true that good hunches are the foundation of good police work. It is likewise true that hunch playing does not rise to the level of probable cause.

In earlier portions of this petition, petitioner complained of the inadequacy of the review provided in the Ninth Circuit, as evidenced by the terse boilerplate response to petitioner's Fourth Amendment challenge. The distinction between suspicion and probable cause is central to proper interpretation of the Fourth Amendment. The opinion rendered below gives no indication that the distinction was given any meaningful consideration.

The lower court's failure to highlight the distinction between suspicion and probable cause reflects disregard of applicable standards promulgated by this Court. Acceptance of this case for full review gives this Court an opportunity to extend the "trained police officer" analysis of *Cortez* to a warrantless arrest. Accordingly, petitioner seeks full review by this Court on that question. Should the Court decline to order review on that basis, petitioner seeks, in the alternative, a remand to the Ninth Circuit Court of Appeals with instructions to address the distinction between suspicion and probable cause and to articulate in detail application of those two standards to the specific facts of this case.

III

DESPITE RECENT ARTICULATION BY THIS COURT AS TO THE NECESSITY OF TAILORING VOIR DIRE TO THE FACTS OF A GIVEN CASE, THE DECISION RENDERED BELOW REFLECTS FAILURE TO APPRECIATE AND APPLY A TAILORING ANALYSIS. THE POTENTIAL FOR SIGNIFICANT RECURRING PROBLEMS WITH RESPECT TO THE UNWARRANTED RESTRICTION OF VOIR DIRE IN CRIMINAL CASES WARRANTS A GRANT OF CERTIORARI

This petitioner stood charged with having violated federal narcotics laws. The amount of controlled substance in question was approximately eleven pounds of powdered

amphetamine having a government estimated street value in excess of one million dollars. The government devoted a considerable portion of its presentation at trial to the addictive characteristics of amphetamine and the dangers attendant upon its continued use.

Defense counsel sought the opportunity to make a limited inquiry as to whether or not any member of the venire was related to or acquainted with a person who had experienced difficulty or problems with narcotics. The trial judge was given two separate opportunities to consider that request. The request was twice denied. On appeal, the Ninth Circuit panel dismissed the claim of error as unpersuasive, noting further that the claim found ". . . no support whatsoever in the record."

Before moving to a consideration of the case law in this area, it should be noted that the trial judge did ask the following general and compound question:

> "Are there any of the prospective jurors who have a belief or opinion that the offenses charged in this case are unique in any respect, and by unique, I mean that they should be pursued with extraordinary vigor or shouldn't constitute an offense, or that they carry penalties which you consider improper?"

The government argued below that the general question propounded adequately covered the area of inquiry identified by the defense.

Counsel is mindful of the fact that considerable deference is given to the decisions of federal trial judges in reviewing the adequacy of the jury selection process in a criminal case. *Rosales-Lopez v. United States*, ... U.S. ....., 101 S.Ct. 1629 (1981). Counsel is also mindful of the fact that a federal trial judge remains free to conduct voir dire with limited participation on the part of defense counsel. Nonetheless, whenever a trial judge personally under-

takes the examination of potential jurors, there is a duty to insure that the inquiry is tailored to fit the circumstances of the case and the offense charged. E.g. *United States v. Baker,* 638 F.2d 198 (10th Cir. 1980)—trial judge conducting voir dire has a duty to consider the perspective of informed counsel in determining what questions will tend to reveal possible prejudice and a duty to tailor the voir dire to fit the circumstances of the case; *United States v. Shavers,* 615 F.2d 266 (5th Cir. 1980)—trial court abused discretion, where defendant stood accused of a violent crime and trial judge refused to ask series of questions relating to whether jurors had ever been victims of violent crime or had suffered lacerations as the result of an attack; *United States v. Barnes,* 604 F.2d 121 (2nd Cir. 1979), cert. denied 446 U.S. 97—multi-defendant heroin trial in which the reviewing court, in dicta, described as "usual", a question as to whether the panel members or close friends or relatives had any prior experience with narcotics. The circuit opinions cited above show widespread and diverse attitudes on the trial bench as to the essential scope of voir dire.

Counsel is mindful of the fact that there is a clear distinction between voir dire challenges resting on constitutional grounds and those resting on federal supervisory power. See *Rosales-Lopez v. United States,* supra; *Ristiano v. Ross,* 424 U.S. 589 (1976); *Aldridge v. United States,* 283 U.S. 308 (1931). Petitioner's request for review does not rest on constitutional grounds. Petitioner instead seeks review as an exercise of this Court's supervisory power.

Review of this Court's most recent decision regarding the adequacy of voir dire shows that the nature of the crime charged is a salient factor in determining the adequacy of voir dire. *Rosales-Lopez v. United States,* supra. The nature of the crime and its attendant social effects

were crucial here. The so-called "war on narcotics" is a fact of life in this country. The incidence of drug use and abuse and the fallout effects of drug use and abuse are matters of common and wide-spread concern. The effects of the drug trade are far reaching. Those effects cross color lines, class lines and are evident in all social strata in this country.

Those charged with the responsibility of selecting fair and impartial individuals from a cross section of the community, judges and attorneys alike, cannot ignore the fact that the aftermath of drug use is widespread and increasingly common. In short, it is a factor that cannot be ignored in any drug prosecution involving an accusation of participation in the drug trade at a high level. As noted previously, these defendants stood accused of trafficking in an addictive substance that had a government estimated street value in excess of one million dollars. Despite that fact, the trial judge twice denied a specific and limited request for inquiry as to whether any prospective members of the jury had a relative or friend who had experienced difficulty with narcotics.

Counsel is mindful of the fact that there are certain areas of inquiry that, even though directly related to the charge at issue and its social effects, are not productive areas of inquiry. See *United States v. Hamling,* 418 U.S. 87 (1974) —prosecution for use of the mails to carry an obscene book. Counsel there sought to ask questions designed to expose bias and prejudice concerning obscenity and sex. This writer cannot envision a more open ended and potentially fruitless inquiry than an inquiry into a potential juror's views on obscenity. The same can be said as to an inquiry as to a potential juror's personal views on sex.

The request made in this case in no way approaches the open-ended and fruitless inquiry sought by defense counsel in *Hamling.* The inquiry sought by counsel here was direct

and limited—designed to assit counsel in the intelligent exercise of peremptory challenges. An affirmative answer to that inquiry would have given defense counsel, without benefit of any additional questions, a basis for exercising peremptory challenges. See *Swain v. Alabama,* 380 U.S. 202 (1965)—re the importance of peremptory challenges.

It is doubtless true that many members of the federal trial bench rely on the "bench book" in the questioning of potential jurors. Counsel who practice in those courts have come to believe, however, that the bench book has come to be an end in itself rather than a guide. Anyone could examine the entire voir dire given in this case and give that same voir dire in virtually any criminal lawsuit. It could be given. Its effectiveness, however, would depend upon the facts of each case. A statement from this Court is essential to insure that control from the bench does not become license.

The question raised goes to the heart of the effective operation of the jury trial system in this country. Counsel does not seek to open voir dire to the point that the defense bar will come in and request, a la Clarence Darrow, the opportunity to subject each individual juror to an inquisition covering his or her entire family history, social attitudes and outlooks. Petitioner instead requests from this Court a pointed statement that will remind the federal trial bench that voir dire is not a rote exercise.

Petitioner seeks full review and an opportunity to ask this Court to remind the federal trial bench of their independent obligations in insuring the vitality of the jury selection process. Petitioner requests a statement that will require pointed focus on clearly salient factors capable of pointed, but limited, exploration. Absent such a reminder, untested discretion breeds license. Pointed and particularized voir dire is supplanted by empty ritual.

The need for this Court's exercise of its supervisory power is highlighted by the compound boilerplate substitute given the jury in this case. The "question" was three questions combined. Jurors were expected first to parse the complexities of the inquiry and then disqualify themselves by deciding, in that short span of time, whether their past experiences left them with a feeling strong enough to warrant the conclusion that, in their minds, such a case should be prosecuted with special vigor.

The point of any questioning, be it of juror or witness, is to be direct. Eg. *United States v. Shavers*, 615 F2d 266 (5th Cir. 1980)—criticizing use of general inquiry. Venire members are not versed in the law. They are not practiced in the art of being neutral. Absent vital, searching and pointed inquiry, the voir dire process loses its utility and effectiveness.

The terse responses given by both the trial and appellate judges previously involved in this case are the tip of an iceberg that will remain submerged and threatening until this Court steps forward and provides supervisory guidance designed to insure pointed focus on salient factors in all criminal cases. Absent such intervention, this Court's assurance of the essential adequacy of the voir dire process will be clouded. Accordingly, petitioner requests full review of this issue.

As has been done with the other claims of error discussed in this petition, petitioner seeks relief in the alternative. Should this Court conclude that full review is not appropriate, the petitioner requests a remand with instructions to reconsider the voir dire issue in light of already existing non-constitutional standards that require inquiry whenever there is a "reasonable possibility" that the area of inquiry might have influenced the prospective jury members.

IV

THE PANEL'S SUMMARY REJECTION OF PETITIONER'S CLAIM OF PROSECUTORIAL MISCONDUCT REPRESENTS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO SIGNIFICANT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. THE ABSENCE OF ANY OPINION FROM THIS COURT ON THE APPLICATION OF THE PLAIN ERROR DOCTRINE TO PROSECUTORIAL MISCONDUCT NOT INVOLVING SPECIFIC CONSTITUTIONAL GUARANTEES WARRANTS FULL REVIEW

This Court's pronouncements on the acceptable scope of prosecutorial argument have been limited. Aside from those cases in which prosecutorial comments cut across specific constitutional guarantees, this Court's most frequently cited opinion on the question is *Berger v. United States*, 295 U.S. 78 (1935). In that case, this Court noted the special position occupied by counsel for the government in a criminal case. That decision reflects an essential balance in that it recognizes the prosecutor's right to strike hard and forceful blows and yet denies the prosecutor the right to strike "foul" blows. The opinion in *Berger*, however, does not include a "plain error" analysis.

Petitioner urged a "plain error" analysis at the circuit level. As noted earlier, the panel decision in this case contains a terse and general denial of the claim for relief resting on prosecutorial misconduct. The panel went so far as to say that the claim of prosecutorial misconduct was to be listed among several that found no ". . . support whatsoever in the record." There was no discussion of a "plain error" standard.

So that this Court might appreciate the flavor of the prosecutor's argument below, the challenged comments are set forth below. Counsel for the United States favored the jury with an extended analogy that went far beyond the standard notation that the arguments of counsel are not evidence. The pertinent comments are quoted as follows:

> "As you know from listening to this trial most of it is a lot of hogwash, a lot of bunk. Attorneys don't take an oath. They are representing their respective parties, just like that expert witness, for example.
>
> *****
>
> ". . . (B)ut what I'm drawing is a comparison between lawyers. Lawyers are professionals, too, but they do what they are paid to do. Let's keep it at that."

The comments cited above represent a blatant attack on the integrity of defense counsel. The prosecutor went on in a similar vein by describing legitimately advanced objections as follows:

> "Objection, obstruction, objection. Fight, fight, fight. Don't admit the truth."

The prosecutor's venom was not reserved for counsel. The personal appearance of the defendants was the subject of direct comment.

> "They're just what they appear to be. That's what they look like, mean, calculating, shrewd, greedy."

The prosecutor continued his "crook" theme in another fashion. The petitioner was described as being "seasoned and experienced" in dealing with custodial interrogation. There was absolutely no evidence that petitioner had ever been arrested before.

The prosecutor went on to inject into the case an issue much broader than guilt or innocence of the accused. He invited the jurors to reward the efforts of government agents by returning a verdict of guilty. The pertinent quotes read as follows:

> " . . . (T)here will be a great attack made on their integrity and their ability, the drug enforcement administration agents. They did a good job. The government did a good job. You tell them that when they come in and attack them, when they attack the job these men did."

Comments such as those violate the provisions of Section 5.8 of the ABA Standards relating to the prosecution function and the defense function. See also *United States v. Serrano*, 496 F2d 81 (5th Cir. 1974); *United States v. Brown*, 451 F2d 1231 (5th Cir. 1971)—reversing where the prosecutor injected the "reward" concept into final argument.

The prosecutor also reserved for his rebuttal argument a change in the government's theory of the case. The government had suggested throughout the trial that the "switch" took place at the truck stop—after the meeting at the MGM. Defense arguments were keyed to that theory. In rebuttal, the prosecutor changed gears and suggested that the monies were exchanged at the hotel casino prior to the return to the truck stop. Changing theories at a time when defense counsel is powerless to respond has been recognized as improper conduct. *Moore v. United States*, 344 F2d 558 (D.C. Cir. 1965).

Finally, the prosecutor twice vouched for the credibility of the state's principal witness, the confidential informant previously identified in petitioner's statement of the case.

The Chief Justice of this Court served as a member of the ABA's Advisory Committee on the prosecution and the defense functions. The standards promulgated by that Committee note that it is unprofessional conduct for a prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony. Those standards further indicate that a prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused. See ABA Standards Relating to the Prosecution Function and Defense Function, Section 5.8. Those standards were trampled repeatedly throughout the course of petitioner's trial. The improper conduct was incessant and repetitive and thus should not have been ignored. See *Berger v. United States*, supra.

Petitioner seeks full review here on a "plain error" standard. The absence of any "plain error" opinions concerning prosecutorial misconduct not involving specific constitutional rights warrants full consideration by the Court.

Should this Court conclude that full review is not appropriate at the Supreme Court level, petitioner respectfully requests that the Court exercise its supervisory power and remand this case to the Court of Appeals for further consideration in light of the standards announced in *Berger* and in light of existing circuit standards regarding "plain error".

CONCLUSION

The Fourth Amendment question raised here provides the Court with an opportunity to delineate the value of a trained police officer's observations in the context of a warrantless arrest. The Court's recent decision in *United States v. Cortez*, ... U.S. ....., 101 S.Ct. 690 (1981), involved utilization of a "trained police officer" analysis in the context of establishing "reasonable suspicion" sufficient to warrant a stop. The Court did not reach the question of probable cause. The question is ripe for full consideration by this Court.

The voir dire question raised here allows the Court an opportunity to make a statement that tracks the analysis set forth in this Court's recent opinion in *Rosales-Lopez*. There, the nature of the crime, a crime of violence, was inextricably bound up with a question of race. Here, the crime itself and its widespread national impact loom large enough to warrant specific inquiry on voir dire. The need for guidance from this Court is clear.

The claim of prosecutorial misconduct allows the Court an opportunity to address the "plain error" standard in a framework that does not involve interference with specific constitutional guarantees. The Court has made no statement on this issue since the *Berger* decision was announced in 1935. Moreover, *Berger* did not address application of the "plain error" doctrine.

Each of the substantive issues raised involves a question deserving of the full attention of the Court. Should the Court conclude that full review is inappropriate, petitioner seeks alternative relief in the form of a summary remand for reconsideration and specific articulation of the

lower court's bases for denying relief. This supervisory question presented is one of degree. Certainly, there will be many cases in which summary disposition of a direct appeal is in order. The serious questions raised below warranted particularized analysis that was not forthcoming. Summary remand is in order.

Respectfully submitted this 5th day of January, 1982.

JOHN L. CONNER
Counsel for Petitioner

(Appendices follow)

Appendix

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellee,

vs.

Harry O'Brien, Clifford Doyle Lee
and James Robert Brown,
Defendants-Appellants.

Nos. 80-1170, 80-1261, 80-1319
D.C. No. 79-55

Appeal from the United States District Court
for the District of Nevada

Edward C. Reed, Jr., District Judge, Presiding
Argued and Submitted July 15, 1981

Filed September 10, 1981

MEMORANDUM

Before: NELSON and NORRIS, Circuit Judges, and
REAL,* District Judge

Appellants O'Brien, Brown, and Lee were convicted, after trial by jury, of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841 (a)(1), and conspiracy to possess and distribute a controlled substance, in violation of 21 U.S.C. § 846. O'Brien and Brown were convicted, in addition, of interstate travel in aid of racketeering activity (distribution of a controlled substance), in violation of 18 U.S.C. § 1952(a)(3). On appeal, the appellants allege a long list of errors by the

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

trial court. We find no merit in any of the appellants' contentions and, accordingly, we affirm the convictions.

Based on our independent review of the record, we uphold the trial court's conclusion that the officers had probable cause to make warrantless arrests of the appellants. Our review also convinces us that the affidavits in support of the search warrants are sufficient to demonstrate probable cause. *See United States v. Fried,* 576 F.2d 787, 790-91 (9th Cir. 1978). The seizure and searches of the Blazer were clearly lawful under *United States v. Johnson,* 572 F.2d 229 (9th Cir.), *cert. denied,* 437 U.S. 907 (1978).

The admission of certain testimony at trial did not violate, under *Bruton v. United States,* 391 U.S. 123 (1968), any appellant's right to confrontation. There is no violation of *Bruton* where, as here, the testimony in question is not "powerfully incriminating." *See United States v. Buckner,* 610 F.2d 570, 574 (9th Cir. 1979).

The admission of Lee's post-arrest statements did not violate his *Miranda* rights. The trial court properly found a waiver by Lee. *See Fare v. Michael C.,* 442 U.S. 707 (1979).

The appellants remaining claims—prosecutorial misconduct, insufficiency of the evidence, insufficiency of voir dire, ineffectiveness of counsel, factual misstatements by the trial court, and double jeopardy—are similarly unpersuasive. None find any support whatsoever in the record.

AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Harry O'Brien, Clifford Doyle Lee and
James Robert Brown,
Defendants-Appellants.

Nos. 80-1170, 80-1261, 80-1319
D.C. No. 79-55

Order

Filed Nov. 12, 1981

Before: Nelson and Norris, Circuit Judges, and Real*, District Judge

The panel as constituted in the above case unanimously voted to deny the petitions for rehearing of Defendants-Appellants Lee and Brown, and rejects their suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The said petitions for rehearing are Denied and the suggestions for rehearing en banc are Rejected.

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.